NO. 21729

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT NORMAN PEDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

Appellant, Robert Norman Pederson and co-defendant Jerry Wayne Clark, were indicted by the Federal Grand Jury for the Southern District of California, Central Division, on August 17, 1966 in case No. 36536. The indictment is in four counts. Count One charges appellant and co-defendant with conspiracy to smuggle goods into the United States in violation of 18 U.S.C. §371; Count Two charges appellant and co-defendant with the receipt, concealment and facilitation of the receipt and concealment of amphitamine tablets and barbiturate pills in violation of 18 U.S.C. §545. Counts Three and Four charge appellant and co-defendant with the possession of "stimulant or depressant drugs" in violation of 21 U.S.C.,

§331(q)(3) and §360a(c) [C. T. 2]. 1/

On August 23, 1966 appellant was arraigned in case No. 36536 before the Honorable Charles H. Carr, United States District Judge. Appellant entered a plea of not guilty to all counts of the indictment and the trial of the case was transferred to the Honorable Walter E. Craig, United States Judge, sitting in Los Angeles by designation. On the same date a jury was impanelled [R. T. 2-8] 2/ and appellant's Motion to Suppress Evidence was heard and denied by the court [R. T. 10-46]. On August 24, 1966 appellant's Motion to Dismiss the Indictment was heard and denied by the court [R. T. 47-53], and jury trial of case No. 36536 commenced [R. T. 53]. Appellant was represented by counsel at all stages of the proceedings.

On August 26, 1966 appellant was found guilty by jury verdict of all counts of the indictment [R. T. 259-261]. On September 13, 1966, after a pre-sentence investigation and report, appellant was sentenced to the custody of the Attorney General or his authorized representative for a term of five years on Counts One and Two and one year on Counts Three and Four, said sentences to run concurrently [C. T. 53].

On September 14, 1966 a timely notice of appeal was filed by appellant [C. T. 54].

The District Court had jurisdiction by virtue of Title 18, U. S. C. §§3231, 371 and 545 and Title 21, U. S. C. §§333(a), 331(q)(3),

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1/ "C. T." refers to Clerk's Transcript of Record.

2/ "R. T." refers to Reporter's Transcript of Record.

360a(c), 321(v)(1), and 321(v)(2). This Court has jurisdiction to entertain this appeal under the provisions of Title 28, U.S.C. §§1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . . "

Title 18, United States Code, Section 545 provides as follows:

> "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the custom house any false, forged, or fraudulent invoice, or other document or paper; or
>
> "Whoever fraudulently or knowingly imports or

brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -

"Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

"Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

Title 21, Section 360a(c) provides:

" * * *

"No person, other than a person described in subsection (a) or subsection (b)(2) of this section, shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal

prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by section 331(q)(3) of this title), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

" * * * "

Title 21, Section 321 provides in part:

" * * *

"(v) The term 'depressant or stimulant drug' means -

"(1) any drug which contained any quantity of (A) barbituric acid or any of the salts of barbituric acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under section 352(d) of this title as habit forming;

"(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer or amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; . . .

" * * * "

Title 21, Section 331q(3) prohibits:

" . . . the possession of a drug in violation of section 360a(c) of this title. . . . "

" * * * "

Title 21, Section 333(a) provides in part:

"Any person who violates any of the provisions of section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; . . . "

III

STATEMENT OF FACTS

In the later part of May, 1966, Customs Agent David F. Burnett, San Ysidro, California, was contacted by a previously reliable informan [R. T. 57], who stated he had been hired by an unidentified male Mexican adult to drive a 1955 Mercury, California License No. GIX 090, equipped with a gasoline tank with a false compartment containing pills, from Tijuana, Mexico, to a Sam's Restaurant on Pacific Coast Highway in Huntington Beach, California. The informant's instructions were to park the 1955 Mercury in the parking lot of the restaurant, to into the restaurant, wait one hour and then come out and look in the Mercury where he would find $100 [R. T. 144-145]. The informant was advised by Customs agents.

to adhere to the instructions given him by the stranger in Tijuana, Mexico [R. T. 59, 67-68].

On May 31, 1966, at 1:25 p. m., Customs Agent Burnett observed the 1955 Mercury, California License No. GIX 090, driven by the informant, enter the United States through the Port of San Ysidro, California [R. T. 58, 64]. Constant surveillance on the 1955 Mercury was maintained as it proceeded north to the vicinity of Pacific Coast Highway and Warner Avenue, Huntington Beach, California. Approximately 10 miles north of San Diego, Agent Burnett inspected the Mercury by kicking the gas tank and he stated that he "could hear a rattle, which appeared to me to be pills or some small articles." [R. T. 58-59]. Along the way the Mercury stopped for gas every 35 to 50 miles [R. T. 61]. At San Clemente the Mercury was placed on a hoist and the gas tank was again inspected. Agent Burnett again heard the rattle of pills [R. T. 60]. Customs Agents maintained surveillance on the 1955 Mercury as it was driven to and parked in the parking lot of Sam's Restaurant, Pacific Coast Highway, Huntington Beach, California. This was at approximately 5:25 p. m. on May 31, 1966. The informant then got out and went into the restaurant [R. T. 60-62].

At approximately 5:35 p. m. Agents Watson and Diaz observed a white Ford Ranchero, California License No. NWG 629, drive by Sam's Restaurant traveling south. The two occupants parked across the street and went into the "Chicken Coop" Restaurant. The driver was appellant Robert Pederson and the passenger was co-defendant Jerry Wayne Clark [R. T. 72-74]. The two

occupants of the Ford Ranchero came out of the Chicken Coop Restaurant and drove north on Pacific Coast Highway. The Ford Ranchero was next observed traveling south on Pacific Coast Highway [R. T. 76] and then north again on Pacific Coast Highway [R. T. 78].

At approximately 6:30 p. m. the 1962 Ford Ranchero truck, driven by appellant, returned and drove alongside the 1955 Mercury and stopped. The passenger, co-defendant Clark, got out of the truck, and got into the 1955 Mercury and drove it away. Appellant followed closely in the 1962 Ford Ranchero [R. T. 82, 95]. Customs Agents continued to maintain surveillance of both vehicles until they came to the intersection of Warner and Pacific Coast Highway. Here appellant, in the 1962 Ranchero, continued south on Pacific Coast Highway, and co-defendant Clark turned left on Warner [R. T. 83]. Customs Agents continued to maintain surveillance of Clark in the 1955 Mercury, while other agents maintained surveillance of the 1962 Ford Ranchero. When it became apparent that both drivers were aware they were being followed, they began to take evasive tactics [R. T. 91-92, 95-96, 100]. The 1955 Mercury was at Warner and Fairview in Santa Ana, California, and the 1962 Ford Ranchero was at Del Mar and Tustin Avenue in Costa Mesa, California when they were stopped and arrested. The Ford Ranchero driven by appellant had taken a parallel route, headed in the same direction as the Mercury driven by co-defendant Clark [Gov'ts. Exhibit No. 2].

On May 31, 1966, an examination was made of the 1955

Mercury, California License No. GIX 090. The vehicle's gasoline tank was removed and contained therein were approximately 100,100 white amphetamine sulfate tablets and 486 red barbiturate capsules [R.T. 87, 97, 98, 104, 109].

The 1955 Mercury, California License No. GIX 090, was registered to James E. or Tina Heintz, 15717 Brighton Street, Apartment B, Gardena, California [Govt. Exhibit No. 6]. Mr. & Mrs. Heintz stated they sold the auto approximately in July, 1965 for cash to two men. They identified co-defendant Clark as one of the men who bought the auto and appellant Pederson was the other; however, they were not positive [R.T. 113-126, 127-134]. Apartment B, 15717 Brighton Street, Gardena, California, was appellant Pederson's mother's residence and appellant is the landlord of that apartment house [R.T. 140].

IV

ERRORS SPECIFIED BY APPELLANT

Appellant has specified the following points on appeal: 3/

1. The evidence of appellant's guilt on all four counts was entirely circumstantial and insufficient to permit the jury to try the case, since the corpus delicti of the indictment offenses was not established as to appellant, and the trial court's denial of appellant's motion for acquittal thereby was reversible error.

3/ Appellant's Op. Br. pp. 8-9.

2. The record is devoid of sufficient evidence to establish a corpus delicti of the indictment offenses, in that the only person crossing the border with concealed narcotics was a paid informant, all of whose acts were known to and controlled by federal customs agents; any pre-existing conspiracy to defraud the United States was therefore terminated, as a matter of law, before the informant, Gonzalez, entered the United States.

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT.

In a criminal case, evidence upon appeal is viewed in the light most favorable to the Government.

Hiram v. United States, 354 F. 2d 4, 7
(9th Cir. 1965);
Stein v. United States, 337 F. 2d 14, 16
(9th Cir. 1964).

This rule also includes all inferences to be drawn from the evidence.

Yeargain v. United States, 314 F. 2d 881, 882
(9th Cir. 1963).

The evidence presented by the Government and pointing to appellant's guilt was not entirely circumstantial as appellant would have this Court believe (Appellant's Opening Brief, p. 8), and briefly is as follows:

1. In May 1966 a reliable informant was contacted in Mexico and hired to drive a car from Tijuana, Mexico to Huntington Beach, California.

2. The vehicle was equipped with a compartment in the gasoline tank containing pills.

3. This vehicle was sold to the co-defendant and another individual, possibly appellant, in July 1965.

4. At the time it was sold, the vehicle did not have a special compartment in the gasoline tank.

5. On May 31, 1966 this vehicle crossed the border into the United States and arrived at its destination as per instructions.

6. About ten minutes after its arrival appellant drove his vehicle by the place where the load vehicle was parked.

7. Appellant drove back and forth past the location of the load vehicle.

8. Appellant then stopped next to the load vehicle and the co-defendant got into the load vehicle and drove away with appellant following.

9. Thereafter appellant took a different road heading in the same direction as the load vehicle.

10. Thereafter appellant began to take evasive action when he presumably noticed that he was being followed.

11. The load vehicle, although sold in July, 1965, was still registered to the sellers with the only change being that the address was that of appellant's apartment house.

The evidence outlined above was both direct and circum-

stantial and certainly adequate to permit the jury to determine the guilt of the appellant. The jury, as the trier of fact, was not limited to the bald statements of the witnesses. On the contrary, the jury properly drew reasonable inferences from the facts presented.

The guilt of the appellant was properly established without proof that he personally did every act constituting the offense charged.

Pereira v. United States, 347 U.S. 1 (1954);

Nye & Nisson v. United States, 336 U.S. 613 (1949).

As the case comes before this Court, the sole issue relating to the sufficiency of the proof is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." A verdict supported by sufficient evidence is binding on a reviewing court.

United States v. Socony Vacuum Oil Co., Inc., 310 U.S. 150, 254 (1940).

As stated in Glasser v. United States, 315 U.S. 60, 80 (1942):

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. United States v. Manton, 107 F. 2d 834, 849 and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a

common purpose and plan may be inferred from a 'development and a collocation of circumstances.' United States v. Morton, supra." [Emphasis added].

Harney v. United States, 306 F. 2d 523, 530 (1st Cir. 1962), cert. denied 371 U.S. 911.

It is submitted that the evidence which the jury believed not only amply supports, but in fact compels, the verdict which the jury returned.

B. A CONSPIRACY WAS ESTABLISHED NOTWITHSTANDING THE PARTICIPATION OF GOVERNMENT AGENTS.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. The evidence in this case established that appellant was an active member of the conspiracy alleged and as such tacitly, if not positively, in some way or manner, or through some contrivance, came to a mutual understanding to try to accomplish a common and unlawful plan, i.e., smuggle pills into the United States.

Cf. United States v. Aviles, 274 F. 2d 179 (2nd Cir. 1960);

Dennis v. United States, 302 F. 2d 5 (10 Cir. 1962).

The success or failure of the conspiracy to accomplish the common object or purpose is immaterial since a conspiracy is a crime even though the contemplated offense may never be

consummated.

Harney v. United States, supra, at 531.

In the present case appellant contends that conspiracy to smuggle pills was not established because Government agents were aware of the illegal importation and in fact permitted it and therefore the act of smuggling did not occur. The record is clear that the informant contacted the agents after his initial contact with the stranger in Mexico and after he was hired to drive the load vehicle to the United States. At all times the informant was advised by the Government agents to adhere to the instructions previously given him by the stranger in Mexico. To require immediate seizure of the contraband upon discovery would deprive federal officers of a most effective method of obtaining evidence against ultimate consignees, clearly a result contrary to congressional intent.

United States v. Davis, 272 F. 2d 149, 153 (5th Cir. 1959).

Appellant further contends that it is not an offense for a Government agent to transport narcotics into the United States. Appellant cites no statute, regulation or law which authorizes government agents to import narcotics for purposes of subsequent criminal prosecution. Participation of a Government informant obviously does not negative the illegality of the importation. In transporting the 1955 Mercury from Tijuana, Mexico, to Huntington Beach, California, the informant was an employee of the stranger in Mexico and the co-conspirator who were to pay him in the United States. His role as an informant consisted only of assisting the

officers in the discovery of the illegally imported pills, and the apprehension of the intended recipients.

The argument made by appellant was rejected by the United States Court of Appeals for the Fifth Circuit in Haynes v. United States, 319 F. 2d 620 (1963). As described by the court:

> "The theory of the appellants is that since the proof established that the marihuana was brought from Mexico by a government informer, one Juan Sanchez, and his bringing it in was assisted by government agents, it could not be held that it was unlawfully brought in for the reason that, under the statute, it is not an offense for a government agent to bring marihuana into the United States, and further that since, under federal law, government agents are not required to pay any tax on marihuana, there was no violation of either the smuggling statute or the transferee statute." 319 F. 2d at 621-622.

In rejecting this theory, the court concluded:

> "As we see it, though the defendants in this argument pile Pelion on Ossa to deprive the case of legal substance by making it appear that there was no violation by the defendants but by the government itself, the facts, looked at in their reality and sequence, show that the commission of the offenses, as to which the appellants were convicted, is clearly and thoroughly established. . . . " 319 F. 2d at 622.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez

GABRIEL A. GUTIERREZ